Supreme Court, U.S.
FILED
JUN 10 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-870

In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM AND RESPONDING TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This reply brief is submitted on behalf of the Louisiana Public Service Commission ("Louisiana Commission"), appellant, to respond to certain arguments raised in the motion to dismiss or affirm of South Central Bell Telephone Company ("South Central Bell"), appellee, and the Brief for the United States as Amicus Curiae, submitted jointly by the Solicitor General and the Federal Communications Commission (collectively, "the Government").

ARGUMENT

1. South Central Bell and the Government suggest that the decision of the court of appeals is not appealable pursuant to 28 U.S.C. §1254(2) because it is not "final," but affirms a preliminary injunction. Motion at 13-14; Gov't Brief at 17-18 n.9. In support of this position, they cite *Slaker v. O'Connor*, 278 U.S. 188 (1929), decided under the predecessor provision to 28 U.S.C. §1254(2), and *South Carolina Electric and Gas Co. v. Flemming*, 351 U.S. 901 (1956), which dismissed an appeal, citing *Slaker*, without comment. In both *Slaker* and *South Carolina Electric*, decisions of district courts granting motions for dismissal were reversed by the courts of appeals and the cases remanded for further proceedings. Neither case involved a decision to affirm a preliminary injunction invalidating a state law as unconstitutional.

South Central Bell and the Government concede that the supposed "finality" requirement has been questioned by the Court. Motion at 13; Gov't Brief at 17 n.9. Section 1254(2) contains no finality requirement, unlike other jurisdictional statutes. *See* 28 U.S.C. §§1257, 1291. In *Doran v. Salem Inn, Inc.*, 422 U.S. 931 (1975), this Court treated as an open question the issue of whether a decision affirming a preliminary injunction is appealable when the ruling invalidates a state law, but declined to resolve the issue. *Id.* at 927. Moreover, even in cases when it assumed the existence of a "finality" requirement, the Court has applied a practical rather than technical test. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976); *City of Chicago v. Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77, 82-83 (1958).

In this case, the decision of the court of appeals affirms a decision invalidating state ratemaking orders and requiring state regulators to implement a rate increase to fund new accounting practices prescribed by the FCC. No remand has been ordered; no further proceedings are scheduled, and it is unlikely that a trial on the merits will ever occur, even if the decision below is affirmed. The jurisdictional and rate of return issues are ripe for review. Therefore, any "finality" requirement implicit in Section 1254(2) is satisfied.

2. In arguing that a state commission is a "person" subject to an enforcement proceeding under 47 U.S.C. §401(b), South Central Bell states that Section 401(b) should be compared with the provision authorizing enforcement of orders of the Interstate Commerce Commission, 49 U.S.C. §16(12), on which Section 401(b) was modeled. The enforcement provision of the Interstate Commerce Act permits a private party action only against a "carrier." Since Section 401(b) uses "person" rather than "carrier," South Central Bell infers that "Congress intentionally expanded the class of defendants against whom injunctions could issue under §401(b)." Motion at 19. This interpretation is erroneous. In the Communications Act, Congress gave the FCC regulatory authority not only over communications common carriers, but over parties engaged in radio *broadcasting. See* 47 U.S.C. §301 *et seq.* The use of "person" rather than "carrier" permits enforcement actions against both types of regulated entities.

South Central Bell is correct, however, in noting that Section 401(b) was modeled after 49 U.S.C. §16(12). Both sections are designed only to authorize private party enforcement suits against regulated parties. Congress had no

intention of permitting federal court actions against state regulatory commissions to require intrastate rate increases deemed appropriate by the FCC.

3. The Government argues that the court of appeals correctly interpreted *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945), as permitting a suit to enforce a rulemaking "order" pursuant to Section 401(b), and that the First Circuit's distinction of *Ambassador, Inc.* is incorrect. Gov't Brief at 11. *Ambassador, Inc.* was a suit instituted by the United States at the request of the FCC. 325 U.S. at 318. The FCC had issued an order to two telephone companies requiring the filing of a tariff to regulate the charges assessed by hotels to their guests; the telephone companies complied by filing a tariff. *Id.* at 320-21. The suit was filed against the telephone companies and 27 hotels to enjoin the hotels from collecting charges from their guests in excess of the tariff and to enjoin the telephone companies from providing service to hotels that did not comply with the tariff. The district court issued an injunction only against the hotels, and the ruling was affirmed.

Contrary to the argument of the Government and the analysis of the court of appeals, *Ambassador, Inc.* could not have been a Section 401(b) proceeding. First, the case did not involve an "order" issued to the hotels made subject to the injunction; the injunction instead required the hotels to comply with a tariff filed by the telephone companies. Second, there is no indication in *Ambassador, Inc.* that the tariff or any FCC "order" was "duly served" on the hotels, as required by Section 401(b). Third, the Court specifically indicated that the enforcement proceeding was brought to secure compliance with the Communications

Act, as authorized by Section 401(a): "Since the regulation, apart from questions of reasonableness which must be presented to the Commission, is a valid regulation of the subscriber's use of telephone facilities involved, a departure from the regulation is forbidden by the Act and the prosecution of an action to restrain a violation is authorized." *Id.* at 325.

The determination of the court of appeals that "§401(a) only authorizes a district court to enjoin violations of the Act itself," and not violations of regulations, is inconsistent with *Ambassador, Inc.* 744 F.2d at 1117, App. at A-19. Moreover, the court of appeals engaged in circuitous and self-serving reasoning in rejecting the First Circuit's interpretation that *Ambassador, Inc.* may have been brought under Section 401(a). The court of appeals apparently conceded that a violation of a regulation is a violation of the Act, but held: "We think it is clear...in light of the existence of §401(b), that the scope of a district court's authority under Section 401(a) is limited to enjoining violations of specific provisions of the Act and not rulemaking orders or tariff regulations." 744 F.2d at 117 n.18. This restrictive view of Section 401(a), of course, depends on an unduly expansive interpretation of Section 401(b); the court of appeals assumed its own answer to the issue in the logical process of finding the answer.

Nor does *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), mandate an interpretation permitting the enforcement of rulemaking "orders" pursuant to Section 401(b). In *CBS*, this Court held that a rulemaking "order" is reviewable pursuant to 47 U.S.C. §402. The Court relied on the practical harm caused to CBS by the substantive legal interpretation of the FCC. The Court im-

plicitly recognized, however, that the rulemaking "order" at issue was not the type of "order" that could be enforced against CBS. It stated:

> Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act.

Id. at 422. Therefore, *CBS* is not authority for interpreting Section 401(b) to apply to general rulemaking orders.

4. With an eye toward avoiding review of the FCC's *Preemption Decision* in *Louisiana Public Service Commission v. FCC*, No. 84-871 *et al.*, the Government assures the Court that the *Preemption Decision* was not intended to "se[t] intrastate telephone rates." Gov't. Brief at 19. Instead, the Government states that its only disagreement with the Louisiana Commission on the rate of return issue is "whether the state commission's abrupt adjustment of the rate of return...was correctly characterized as disobedience to the district court's injunction... ." *Id.* at 20. Yet the Louisiana Commission could have "disobeyed" the district court's injunction, which enforced the *Preemption Decision*, only if the *Preemption Decision* and the injunction required a dollar-specific increase in intrastate rates.

Nor should the Court be distracted from the substantive issue by the assertions that the Louisiana Commission "held no hearing and considered no new evidence before adjusting the rate of return" and "presented its argument that the adjustment was warranted in light of reduced investor risk caused by the change in depreciation practices

for the first time in its reply brief in the court of appeals." *Id.* First, the Louisiana Commission had only 10 days to comply with the district court's first injunction; there was no opportunity to conduct rate of return hearings. Second, the Commission had before it the record in an entire rate case, including evidence relating to rate of return and risk. Third, the Louisiana Commission provided brief reasons for its decision in its order issued to comply with the initial injunction. App. at A102, A104-05.

Fourth, it is not true that the issue of reducing the rate of return for reduced risk relating to increased cash flow was raised for the first time in the reply brief filed with the court of appeals, although the Louisiana Commission did not brief the issue in its initial brief in the court of appeals. In the district court, the issue was raised and extensively briefed by South Central Bell in an effort to obtain a dollar-specific injunction. In attacking the testimony of Bruce M. Louiselle, a consultant of the Louisiana Commission, South Central Bell stated: "[In a Maryland case] the Office of People's Counsel took the position, again advanced in this case by Mr. Louiselle, that offsetting adjustments in the rate of return and in other areas should be made... ." R., Post-Hearing Memo. of South Central Bell at 20. The company reviewed two regulatory decisions and concluded: "[T]here is no merit to the argument advanced by Mr. Louiselle that the required rate of return is impacted by recognizing these increased expenses and providing revenues to offset them." *Id.* at 22.

The double-edged message inherent in the court of appeals' decision and the Government's brief is this: "We are not in the business of intrastate ratemaking, nor have we precluded the state commissions from adjusting the

rate of return, but if these commissions do not raise intrastate rates to cover every dollar of increased expense resulting from federally-prescribed accounting practices within 10 days, or alternatively, conduct hearings and receive new evidence within 10 days, and offer reasons based on the new evidence that are satisfactory to us for adjusting the rate of return, they violate our orders." The decision represents an unauthorized intrusion into intrastate ratemaking.

5. The use of Section 401(b) to require an intrastate rate increase is unauthorized and unduly strains federal-state relations. Once it entered the intrastate regulatory thicket to require the use of federally-prescribed accounting practice, the district court became entangled with other issues. The district court and court of appeals differed on the justification for the federal rate of return decision, and the Government offers an explanation that attempts to water down the decision of the court of appeals. This confusion underscores the wisdom of leaving intrastate ratemaking to state agencies and courts and, if any federal practices may be imposed on the state commissions, leaving enforcement to the state courts.

Respectfully submitted,

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